***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

75-1373

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P/S

# United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

EVARISTO CALDERON-ARBELOS,

Appellant.

*On Appeal From The United States District Court For The Eastern District Of New York*

# Appellant's Brief

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THE UNITED STATES OF AMERICA

Appellee,

-against-

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# APPELLANT'S BRIEF

## PRELIMINARY STATEMENT

Appellant, EVARISTO CALDERON-ARBELOS, appeals from a judgment rendered against him after a trial by jury at the United States District Court for the Eastern District of New York, on October 3, 1975 and sentencing him, on a conviction for violating 21 U.S.C. Section 846, to treatment and supervision pursuant to the Youth Corrections Act, 18 U.S.C. 5010(b) and a special parole term of five years (Bartels, J.). Appellant is presently on bail pending appeal.

## ISSUES PRESENTED

1. Whether the evidence linking appellant to the conspiracy was sufficient?

2. Whether the use of co-conspirator hearsay denied appellant his Sixth Amendment right of confrontation?

3. Whether the admission into evidence of testimony relating to an uncharged conspiracy to sell cocaine was prejudicial error?

4. Whether the refusal of the trial court to have several crates of marijuana removed from the courtroom constituted error.

## STATEMENT OF FACTS

On April 15, 1974, undercover agent John Bruno, along with undercover agent Angel Rodriquez, met with Betty Hernandez, Rafael Robayo and Manuel Nammur at Francisco's Restaurant in Manhattan (347)*. Discussions were had and arrangements made for delivery of a sample of hashish to the undercover agents as part of a proposed sale of some 2000 pounds of hashish, which had been successfully imported into this country from Colombia (348-352).

This transaction did not take place. To discover why, on April 29, 1975, Bruno called Nammur in Colombia. Nammur explained that the deal fell through because they, Nammur and Robayo, had been followed and they were afraid to complete the sale (355, 503-504). Negotiations for a new sale of hashish and for subsequent cocaine transactions were discussed. Nammur stated that he was sending someone from Colombia to Miami to oversee the new sale of hashish

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* References are to the typewritten minutes of trial.

at an agreed price of $500.00 per pound (377).

On April 30, 1975, Nammur called Jorge Alzate from Colombia and instructed him to arrange for delivery to Bruno and Rodriguez via Jose Garcia (507). Alzate called Rodriguez who asked him to arrange delivery (507). On May 1, 1975, Alzate flew to New York. On the following day he had a meeting with Rodriquez at the Taft Hotel (513, 377-78). Later that day, he tried unsuccessfully to contact Jose Garcia (509-511). Later still, he called Rodriquez and told him that Garcia was not available (513).

On May 3, 1975, Jorge Alzate met with Garcia at Garcia's apartment to discuss delivery. Garcia made a phone call, and told Alzate that the wife of the man who was getting the merchandise had told him that the man was not there (514-517).

Alzate called Robayo in Colombia to inform him of his problems. Robayo told him that Garcia was the person who would be delivering the hashish (518-19). That evening, Alzate called Garcia, who told him that he still could not locate the man with the hashish (521).

During the morning of May 4, 1975, Alzate called Garcia, who told him that delivery would take place that day (521-522). A second call to Garcia revealed that there was a problem obtaining a truck for delivery (522, 531). Alzate then called Rodriquez, who said he would supply the truck (531).

During the afternoon of the 4th, Alzate met with Bruno and Rodriguez at 34th Street and Tenth Avenue, where Alzate was given an empty truck, which unknown to him was marked by the agents to facilitate surveillance (31, 381-382, 532). After receiving the truck, he called Garcia and Garcia subsequently picked up the truck. Alzate followed Garcia, who signalled for him to wait, but Garcia never reappeared (537-39). Alzate called Garcia at his apartment and was told that the person who was to have made delivery had gotten into an accident (540). Alzate called Bruno and Rodriquez and told them what had happened. Rodriguez told Alzate that he had called the people in Colombia and the deal was set for the 5th (541-544).

On the 5th, Alzate picked up Garcia, and with Alzate following he brought the truck to a parking lot at Second Avenue and 56th Street (546-47a). He came back to Alzate and told him to wait by a telephone (548). Later, Alzate was called by Garcia, who arranged a meeting at the Landmark Bar. The address of the Landmark was written on a matchbook previously given to Alzate by Garcia (549). Alzate in turn called Rodriquez and informed him that the transaction was set for that evening (549-50) and a meeting was arranged for 9:30 p.m., at Scotty's Bar on Ninth Avenue and 22nd or 23rd Street (384, 550). At the meeting at Scotty's, Alzate was shown money in the trunk of an under-

cover car driven by another undercover agent (384, 552). After seeing the money, Alzate, Bruno and Rodriguez then went to 46th Street and Eleventh Avenue (554). As they were about to enter the Landmark Tavern, they met Garcia coming out of the bar. Alzate left with him, (387, 555-56) went around the corner and returned with a set of keys (556-57).

Alzate returned to the Landmark and gave Bruno and Rodriguez the keys. Rodriguez then went around the corner, returned, said everything was okay and that they should give Alzate the money (388-89, 558-59). They all went over to the undercover car with the money and upon opening the trunk, several agents made the arrests (389, 559).

Simultaneously with the events of May 4th and 5th, surveillance was kept on the truck given to Alzate by Bruno and Rodriguez. On the 4th, the truck was seen at 34th Street and Tenth Avenue and later at a parking lot (Snow White Parking) on 56th Street, between First and Second Avenues (56-57). On May 5th, the truck was seen parked in the lot on 56th Street between First and Second Avenue (30).

At 8:30 p.m., Calderon and Behar walked east on 56th Street and turned into said parking lot (31), Calderon spoke to the lot attendant (32). Calderon got into the

driver's side and Behar on the passenger side of the truck. The truck then went north on First Avenue to the F.D.R. south, (34) then over the Brooklyn Bridge to 554 Atlantic Avenue, Brooklyn (34). Behar and Calderon went into 554 (54). At about 9:50 p.m., Calderon, Behar and two others loaded big wooden crates into the truck (35). Calderon and Behar got into the van, made a U-turn, and drove to the Brooklyn Bridge (37). The truck went over the Bridge to the F.D.R., to the Houston Street exit and on to Sixth Avenue, where it turned north (38). On 20th Street, the truck made a turn north on Tenth Avenue to 47th Street. On 47th Street and Eleventh Avenue, the truck was parked on the north east side of the street (38).

Calderon and Behar came out of the block and walked north on 11th Avenue. Garcia was walking behind them (42). At the corner of 48th Street and 11th Avenue, all three met and a phone call was made (42). They then hailed a cab (44). At Eighth Avenue and 50th Street the cab stopped and Garcia got out. At this point, Garcia, Behar, and Calderon were arrested (44).

Subsequent investigation showed that the crates containing the marijuana had shipping labels indicating they had been shipped from Puerto Rico. (242)

After Calderon's arrest, a search of his possessions turned up the following: (1) a business card for Kung

Fu, Inc., with the address 554 Atlantic Avenue, written on the back; (2) a business card for Porche-Audi, located at 547 West 47th Street (the approximate location of the van at the time of the arrests), and (3) a Puerto Rico driver's license (236-240, 247).

It was also brought out at trial that Calderon had worked at Porche-Audi about a year prior to these transactions, that he had eaten at the Landmark Tavern (the only restaurant in the immediate area), that he had expressed an interest in opening a Kung Fu school (705-706), and that he lived near the Snow White Parking lot (300 East 56th Street) (227-28).

## ARGUMENT

## POINT I

### THE EVIDENCE LINKING CALDERON TO THE CONSPIRACY WAS INSUFFICIENT

The evidence in this case established only that Calderon made an isolated delivery of marijuana to a member of the conspiracy. This conduct, however illegal, did not make him a member of the conspiracy charged.

Even viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942); United States v. McCarthy, 473 F.2d 300, 302 (2d Cir., 1972), the most that was established was that Calderon delivered a van containing marijuana to a member of the conspiracy. This was a single transaction and is insufficient to support a finding of membership in the conspiracy.

Conspiracy indictments for this type of peripheral activity are precisely the sort for which the courts have shown concern.

"The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in a doctrine is very plain, and it is only by circumscribing the scope of such

all comprehensive indictments that they can be avoided." United States v. Falcone, 109 F.2d 579, 581 (2d Cir.,) aff'd. 311 U.S. 205 (1940).[1]

The Supreme Court of the United States stated in Grunewald v. United States, 353 U.S. 391, 404 (1957):

> Prior cases in this court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.

See also the Court's warning in Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943): "Charges of conspiracy are not to be made out by piling inference upon inference thus fashioning . . . a dragnet to draw in all substantive crimes."

The defendant's knowledge of the existence of others and of the conspiracy itself must be clear, not equivocal, and must demonstrate his specific intent to knowingly join the conspiracy. Where conflicting "inferences are equally valid, the defendant is entitled to the one which favors (him)." Chavez v. United States, 275 F.2d 813, 817 (9th Cir., 1960); Miller v. United States, 382 F.2d 583, 587 (9th Cir., 1967). As the court said in

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1. This applies with equal force to drug conspiracies.

Chavez, supra, at 817, the prosecution must show "some knowledge, explicit or implied, in each defendant of the principal purpose of the conspiracy, and some act or action indicating participation therein."

In Direct Sales Co. v. United States, supra, a case involving the sale of morphine through the mail, the defendant who was engaged in repeated large sales of morphine, alleged that he did not intend to join and participate in a conspiracy to distribute morphine. The court found that though "there may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."

This case falls squarely within the ruling of Direct Sales. The evidence introduced against Calderon does not fairly permit a finding that he knowingly entered an overall conspiracy, or intended to further the aims of the conspiracy.

Certainly, on these facts, to say that Calderon knew of the conspiracy would be to pile "inference upon inference." Direct Sales, supra, at 711.

In addition, the evidence fails to establish

that Calderon participated in any meaningful way in the conspiracy. In United States v. Falcone, supra, it was proved that the defendant sold sugar and material for making beer to members of a distilling ring, with knowledge that the materials would be used for an illegal purpose. The Supreme Court in affirming the opinion of Judge Hand held that a mere purchase or sale does not establish the defendant's knowing entry into an illegal venture, since such a sale does not confirm his "stake in the venture." Moreover, knowledge that goods are to be used for an illegal purpose does not establish that the defendant knew of the conspiracy itself, or willfully associated himself with it. See also United States v. Peoni, 100 F. 2d 401 (2d Cir., 1938).

As Judge Learned Hand said in United States v. Reina, 242 F2d 302, 306 (2d Cir.,), cert. denied sub nom. Moccio v. United States, 354 U.S. 913 (1957), sales may be evidence of either participation in a conspiracy or random transactions with an independent peddler. The court in Reina found that evidence regarding the source of supply was equivocal and therefore, insufficient for conviction. The evidence is certainly equivocal in this case.

This circuit has recognized that transactions with conspirators can in some instances be a participation

in the conspiracy and in others not. The key is the nature of the transaction. United States v. Sperling, 506 F.2d 1323, 1342 (2d Cir., 1974); United States v. De Noia, 451 F.2d 979, 981 (2d Cir., 1971).

> For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the Federal Narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred. United States v. Agueci, 310 F.2d 817, 836 (2d Cir., 1962), cert. den. 362 U.S. 974.

In United States v. Aviles, 274 F.2d 179 (2d Cir.), cert. denied, 362 U.S. 974 (1960), the evidence of participation in a conspiracy showed that defendant accepted a delivery of narcotics, and on another occasion pointed out the person to whom a member of the conspiracy was to make a delivery. On this evidence, the court found that there was no clear proof of more than a single delivery to the defendant, and no suggestion of any conversation or other manifestations by the conspirator through whom he participated which might have given him knowledge as to where the drug was obtained. The court further held, in reversing the conviction, that while it may be assumed that the defendant knew the narcotics were illegally imported, there was insufficient evidence to show that he knew that the person with whom he dealt

was an agent for an existing conspiracy.

This Circuit applied the Aviles rule in United States v. De Noia, 451 F.2d 979 (2d Cir., 1971), a case where evidence of the defendant's unity with the purposes of the conspiracy was uncommonly strong. De Noia delivered to a conspirator, at a pre-planned time and place, a bag of heroin; he was fully aware of what he was doing and what the bag contained. Despite this, his conviction for conspiracy was reversed. If this kind of activity cannot sustain a conviction, then certainly Calderon's delivery cannot either.

In United States v. Sperling, 405 F.2d 1323 (2d Cir., 1974), Del Busto and Garcia left a restaurant and went to a 1969 Blue Pontiac, which contained drugs sold by Lipsky to Valentine. Garcia opened the trunk, removed a wrapped package and handed it to Del Busto, who put it in his jacket. They separated. Del Busto got into a car and drove off. He was arrested and the package found to contain cocaine. Garcia returned to the restaurant and left with Valentine and another. They all went to the trunk of the same Pontiac, and the other person took out a bag of boric acid which turned out to be the substance used to cut the cocaine seized from Del Busto. These activities were held to be insuffi-

cient to support the conspiracy charge against Garcia and Del Busto. Id. at 1342. Also, United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959); United States v. Reina, 242 F.2d 302 (2d Cir. 1957), cert. denied sub nom. Moccio v. United States, 354 U.S. 913; See also, United States v. Ford, 324 F.2d 950 (7th Cir., 1963); United States v. Cook, 461 F.2d 906, 910 n.3, (5th Cir., 1972), cert. denied 409 U.S. 949; United States v. Braico, 422 F.2d 543, 544 (7th Cir., 1970); cf. United States v. Skillman, 442 F.2d 542 (8th Cir., 1972).

Of note, are those cases dealing with defendants whose participation in the conspiracy consisted of purchasing drugs from a conspiracy, an act of much greater culpability than mere delivery.

In United States v. Koch, 113 F.2d 982 (2d Cir., 1940), the defendant was prosecuted for a narcotics conspiracy. "The only evidence which connected the appellant with (the) conspiracy was that about two months after Mauro (another defendant) received the cocaine from Celli, Koch met Mauro on the street in New York City and, after inquiring if he had some cocaine he wanted to sell and being informed that he had 170 ounces, agreed to buy it for $25 an ounce." Koch, supra, at 983. The agreement formed at this meeting was consummated several days later. The court found that Koch did not knowingly join the conspiracy to import and dispose of narcotics. All that was

proved was that the defendant was an isolated purchaser. It was established that Koch, like Calderon did not have steady contact with the conspirators; and it could not:

> . . . be inferred as it was in United States v. De Vasto, 52 F. 2d 26, 78 A.L.R. 36, that he knew of the conspiracy and was acting to further its end rather than exclusively his own . . . Here, for aught that appears, the appellant had no knowledge whatsoever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro's possession of it was unlawful and that was true also of the sale to and purchase by him. Koch, supra, at 983.

Like Calderon, Koch did have contact with criminally culpable persons who were engaged in an illegal conspiracy. But, this evidence of an illegal purchase was:

> . . . not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest . . . the purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his conspirators (citation omitted). It was necessary to the government's case to show that the appellant was in some way associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully. United States v. Peoni, 2 Cir., 100 F.2d 401; Muyres v. United States, 9 Cir., 89 F.2d 784. Koch, supra, at 983.

The government in this case has proved only a delivery of marijuana by Calderon, which is even less than the sort of showing held insufficient for conviction in Koch.

In United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972), the Court held that:

> the relationship of buyer and seller, absent any prior or contemporaneous understanding beyond the mere sales agreement, does not prove a conspiracy to sell, receive, borrow or dispose of stolen property, although both parties know of the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective. Varelli, supra, at 748.

In United States v. Zeuli, 137 F.2d 845, 846 (2d Cir. 1943), Judge Learned Hand stated:

> Although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, as far as he was concerned, began as it ended, with the purchase.

Cases such as United States v. Bynum, 485 F.2d 490 (2d Cir., 1973); United States v. Barrera, 486 F.2d 333 (2d Cir., 1973); United States v. Arroyo, 494 F.2d 1316 (2d Cir., 1974), are distinguishable.

In Barrera, the participation of the defendants was in a single conspiracy to bring 120 kilos of pure heroin into the United States from Europe, inside military footlockers. The conspiracy was such that the participants each played a role in the scheme to import, possess, or sell this single shipment of narcotics. All of which

required a finding of knowledge of the overall aims and purposes of the conspiracy.

Arroyo involved a scheme to import from Europe some 80 kilos of European heroin, concealed in a car, and later a second plan to import 176 kilos and a third of 30 kilos. The vastness of this undertaking and the roles played by each participant established the single purpose of those involved. Namely, to bring drugs into the United States, possess and sell them. Each stage was part of an on-going venture.

In Bynum, the evidence showed a venture where the success of all the parts was dependent upon the success of the whole. It was clearly established that each participant knew the scope of the operation.

Moreover, it was an on-going relationship with clearly defined roles for the participants.

The government below stressed, in evaluating its evidence, the cumulative effect of several circumstantial evidentiary items. The prosecutor argued that the whole was greater than the sum of its parts. It is appellant's contention that the parts had little or no value, and that their total impact appears much greater to a layman than to a judge evaluating their sufficiency.

The marijuana came into the United States from Puerto Rico and Calderon had a Puerto Rico driver's

license. The evidence showed that the marijuana had originally come from Colombia. The fact that it passed through Puerto Rico cannot be used to permit an inference that possession of a Puerto Rico license links the possessor with the contraband. This inference is so wildly speculative that the license should never have even been admitted into evidence.*

The van was left in front of a Porche-Audi dealer, where Calderon had worked a year before. The only possible argument as to the probative weight of this item is that Calderon selected a familiar location to leave the van. This is preposterous. Calderon was a resident of Manhattan, there must have been a thousand familiar places from which, if he made the choice, Calderon could have chosen. That the location was linked to him would indicate that he did not select the delivery site.[2]

As a corrollary of the above, the selection of the Landmark Tavern as a meeting place for the conspirators cannot be linked to Calderon because he, at one time, ate there. The basis for any inferences are just too remote. The same is so, for the inference arising from the evidence indicating Calderon was interested in a Kung Fu school (the crates having been stored at a Karate school).

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*The defense properly objected to this evidence, but was overruled (123).

2. Most importantly, there were numerous other locations of meetings which were clearly selected by people other than Calderon. This is so, because most of the meetings were arranged by Alzate, who did not know Calderon. The happenstance that one of these locations had been a place of Calderon's employment cannot be used as a basis to infer that he selected the site; nor can it be used for the further inference that he controlled this operation.

True, Calderon had the address of the Karate school on the back of a business card, but this indicates innocence not guilt. Had he selected the spot, would it be necessary for him to keep the written notation of the address with him? It is far more likely that the address was needed by Calderon because he had never been to that location before and needed it to make a delivery.

Calderon's defense was not predicated on a denial that he delivered this van; rather, it was that he was unaware of the nature of the items delivered. It would be natural, that if he were going to make a delivery that the vehicle for making that delivery be available to him. Thus, the location of the parking lot where the van was kept offers nothing to show that Calderon knew of the contents of the van or the purposes of the conspiracy at the time of the delivery.

When the evidence above is put along side the testimony that there was a total absence of evasive action in the route taken by Calderon in making the delivery, the weakness of that evidence becomes apparent. Moreover, the weight of the evidence was that control of these transactions resided in the people in Colombia. This is so, despite the government's characterization of the Colombians as mere brokers. It was to Colombia that the agents and Alzate turned for guidance whenever the sale

seemed in trouble. Most telling, is that Alzate did not know Calderon. Are we to believe that Calderon, if he was the man behind all these dealings, would permit this large amount of money to be kept by a person who didn't know him, and without any instructions as to disposition? Of course not. The only reasonable inference is that this sale was controlled from Colombia and that Calderon was a dupe, whose only act was to deliver the truck.

The evidence in this case was insufficient to warrant a finding that Calderon was a knowing member of a conspiracy and the conviction should be reversed and the indictment dismissed.

## POINT II

### THE USE OF THE HEARSAY DECLARATIONS OF ALLEGED CO-CONSPIRATORS DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION

The Supreme Court has characterized the co-conspirators rule as a hearsay exception, Krulewitch v. United States, 336 U.S. 440 (1949), but it has not directly decided the validity of that exception as regards the right to confrontation.

> Appellee does not challenge and we do not question the validity of the co-conspirator exception applied in the federal courts. Dutton v. Evans, 400 U.S. 74, 80 (1970).

This court struggled with this question in United States v. Puco, 476 F.2d 1099 (2d Cir., 1973),

cert. denied 409 U.S. 882.

This court, while rejecting Puco's claim accepted the premise that the scope of the exception should be judged on a case to case basis. United States v. Puco, supra.

Appellant contends that this case is distinguishable from Puco and that to have allowed the use of the co-conspirators exception denied appellant his Sixth Amendment right to confrontation.

This court in Puco properly reflected the Supreme Court's growing concern over the relationship between the rules of evidence regarding exceptions to hearsay and the right of confrontation set out in the Sixth Amendment. See, Pointer v. Texas, 380 U.S. 400 (1965); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).

This case presents a different situation than Puco. Applying the rules set out in Puco to this case requires a finding that Calderon's Sixth Amendment right to confrontation was denied to him.

In Puco, the following test was set forth:

> . . . when a co-conspirator's out of court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. Id. at

It is true, that in the usual case, utterances of co-conspirators carry such indicia because they are spontaneous and because they are against penal interest. Here, the hearsay statements, especially those of Jose Garcia relating to the person in charge of the drugs, were not made under such conditions. Garcia may well have been attempting to avoid responsibility for the problems which arose by blaming them on a non-existent co-conspirator. The statements were not made against penal interest. It may be argued that the above argument goes to weight and not admissibility, however some indicia of reliability is required for admissibility, and such is totally absent here.

## POINT III

### THE ADMISSION OF EVIDENCE SHOWING AN UNCHARGED COCAINE CONSPIRACY WAS PREJUDICIAL ERROR

In its proof of the conspiracy, the government offered testimony as to negotiations for cocaine transactions. Appellant was never charged with any crime pertaining to cocaine, and proper objection to the above testimony was made (356-61, 402). Appellant contends that the introduction of this evidence did not fall under any of the exceptions to the general rule that extra-indictment

criminal activity is not admissible against an accused and was prejudicial error. He further contends that even if this evidence was technically admissible, it had no probative value, but great prejudice.

The government established that the Colombians involved in this case, during their discussions with the undercover agents, referred to possible dealings in cocaine. Defense counsel objected to these references, and belatedly the Trial Court limited such references. However, by the time the Court acted, the harm to Calderon was completed and could not be altered.

As a general rule, extra-indictment criminal conduct is not admissible against an accused. Boyd v. United States, 142 U.S. 450 (1892). Exceptions to this general rule do, however, exist.

Such evidence of other crimes is admissible where it is "substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." (emphasis supplied) United States v. Deaton, 381 F.2d 114, 117 (2d Cir., 1971). In this case the only purpose for the admission, against Calderon, of the evidence of the uncharged cocaine conspiracy was to show criminal character. Since, Calderon did not take part in these negotiations, nor was he mentioned, either directly or indirectly, these references to cocaine dealings were not

probative on any issue pertaining to Calderon's guilt. The only purpose was to show that Calderon conspired with people who engaged in the hard drug trade. This prejudiced the jury by introducing a more serious criminal element into the case.

Even if this evidence was admissible, it was not substantially relevant and its probative value as to Calderon was nil, while the prejudice was great. The balancing of probative value and prejudice is properly left, in the first instance to the Trial Court. Here, the scale so clearly is balanced on the side of prejudice, that the Trial Court abused its discretion. United States v. Patt, 426 F.2d 1083 (7th Cir., 1970); United States v. Mickens, 492 F.2d 211 (4th Cir., 1973), cert. denied 94 S.Ct. 2398.*

Nor are the two offenses, hashish and cocaine so blended or connected that proof of one incidently involves the other. See, United States v. Turner, 423 F.2d 481, 483-84 (7th Cir., 1970), cert. den. 90 S.Ct. 2183. Even if they are, the small probative value is clearly outweighed by the prejudice. Moreover, the ease with which the situation was eventually corrected by the court shows that the government lost little in value by

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* The Court's belated attempt to correct this error, was too little and too late (360-61).

exclusion, but gained a great deal in prejudice to Calderon by inclusion.

## POINT IV

### THE REFUSAL OF THE COURT TO GRANT DEFENSE COUNSEL'S REQUEST TO REMOVE THE CRATES OF MARIJUANA FROM THE COURTROOM WAS ERROR.

During the trial, several huge crates containing marijuana were piled up in front of the jury. These crates were, of course, admissible in evidence. However, after their admission into evidence, there was no need or valid purpose to continue to have them displayed to the jury throughout the trial. The only reason to do this, and it required considerable effort to produce these crates each day, was to inflame the jury. The refusal by the Trial Court to heed the request of defense counsel to have the crates removed was error. It is not contended that this error, in and of itself, requires a new trial; rather, in conjunction with the other errors asserted by appellant, the level of error requires a new trial.

## CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR IN THE ALTERNATIVE, A NEW TRIAL ORDERED.

Respectfully submitted,

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J. JEFFREY WEISENFELD, ESQ.
(on the brief)

STATE OF NEW YORK )
: SS.
COUNTY OF NEW YORK )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of April 1975 deponent served the within Notice upon:

US Atty Eastern Dist of N.Y.

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East Brooklyn N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 26
day of April 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976